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VIA HAND DELIVERY

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Acting Secretary
Federal Communications Commission
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SEP-7 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: FCC GEN Docket No. 93-252; Regulatory
Treatment of Mobile Services; Written Ex
Parte Presentation

STATEMENT SUPPORTING STAY OF APPLICATION FREEZE

Dear Mr. Caton:

On behalf of The Southern Company ("Southern"), and pursuant to Section 1.1206 of the Federal Communication Commission's rules, we are writing in support of the Emergency Motion for Stay of Application Freeze ("Emergency Motion") recently filed by certain 800 MHz trade associations. Two copies of this letter are being submitted for inclusion in the docket file.

Southern is in the midst of developing a wide-area 800 MHz SMR system. To ensure adequate coverage throughout its service territory, Southern has on file applications for 143 new base station facilities. The majority of these applications have been pending since November 1993. The potential freeze on pending applications now threatens to frustrate Southern's plan to roll out its service as quickly as possible. The freeze on all new applications also threatens Southern's ability to modify and optimize its system, thereby potentially stranding significant investment.

Background

Southern is an electric utility holding company which wholly owns the common stock of five electric utility operating

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companies and a system service company. These companies are Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Company Services, Inc. Together the companies operate an integrated electric utility system which serves over 11 million consumers in a contiguous area of 122,000 square miles, including most of the State of Alabama, almost all of the State of Georgia, the panhandle of Florida, and 23 counties in southeastern Mississippi.

Southern is in the process of improving its mobile radio communications and is implementing a wide-area, digitally-enhanced 800 MHz system. Southern also intends to sell the excess capacity of its system to state and local governments, utilities, industrial and commercial users, and other customers who can use the dispatch, two-way voice, and data transmission capabilities of Southern's wide-area SMR system. Towards this end, Southern already has licensed numerous 800 MHz SMR facilities throughout its operating territory. It also has submitted Comments and Replies in the instant rulemaking proceeding.

On August 30, 1994, the American Mobile Telecommunications Association, Inc., the Council of Independent Communications Suppliers, the Industrial Telecommunications Association, and the National Association of Business and Educational Radio, Inc. (collectively, "Movants") filed their Emergency Motion. In general, the Movants argue that a freeze on both pending and future 800 MHz SMR applications would prejudice the SMR industry with no countervailing public benefit. Southern agrees and suggests that also, with regard to pending applications, the Commission's discretion to freeze application processing is circumscribed by case law.

Discussion

While concededly the Commission has authority to license SMR spectrum prospectively through competitive bidding, it cannot retroactively apply this licensing scheme to applicants who have applications pending at the FCC which were filed under the existing first-come, first-serve licensing scheme. Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), generally stands for the proposition that statutory grant of legislative rulemaking authority will not be understood to encompass power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. In particular, Bowen notes that:

retroactivity is not favored in the law The power to require readjustments for the past is drastic.

It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find authority absent express statutory grant.

Id. at 208-209.

Nowhere in the Budget Act does Congress direct the Commission to apply its new auction rules to pending SMR applicants. Rather, Congress discouraged the agency from disrupting existing processing and approval of pending applications:

Interruptions in the on-going filing, processing and approval of applications for licenses for existing services, which have not been characterized by rampant speculation, would be disruptive to business operations of existing wireless businesses and damaging to the economy.

On the other hand, it is clear that several new services -- such as interactive video, . . . 220-222 MHz . . . have appeal to speculators who see an opportunity to "game" the Commission's lottery proceeding. To the extent that the Commission is able to utilize the competitive bidding procedures . . . to issue licenses in these services, it will gain valuable information on how to structure [auctions] and deter speculators as well.

H.R. Rep No. 103-111, 103rd Cong., 1st Sess, 263 (1993), 2 U.S.C.A.N. 590 (1993) (emphasis added). The legislative history countenances against retroactivity and applying the freeze against already pending applications.

The same concerns regarding disruptions to business and damage to the economy countenance against imposing a freeze on new 800 MHz SMR applications. The SMR spectrum is nearly depleted. The locations where spectrum remains available are the interstices between already licensed facilities. These areas are useful only to existing systems, either for the expansion of service or for adjustments to existing service. To delay the licensing of this spectrum in order to hold auctions is to thwart the roll out of new service. It also will force existing licensees to cease engineering modifications and to make do with systems which might not meet their needs. Unlike other truly new services where auctions will expedite the licensing process and

William F. Caton
September 7, 1994
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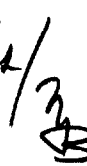
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the provision of service, auctioning the "crumbs" of the SMR spectrum only can slow the process and harm the public interest.

* * * * *

For the foregoing reasons, The Southern Company supports the Emergency Motion for Stay of Application Freeze.

Cordially yours,

Carole C. Harris
Carole C. Harris 

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